

## **EXHIBIT 64**

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10  
11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
13 WESTERN DIVISION  
14

15 **STEVEN RUPP; STEVEN**  
16 **DEMBER; CHERYL JOHNSON;**  
17 **MICHAEL JONES;**  
18 **CHRISTOPHER SEIFERT;**  
19 **ALFONSO VALENCIA; TROY**  
20 **WILLIS; and CALIFORNIA RIFLE**  
21 **& PISTOL ASSOCIATION,**  
22 **INCORPORATED,**

23 Plaintiffs,

24 v.

25 **ROB BONTA, in his official capacity**  
26 **as Attorney General of the State of**  
27 **California; and DOES 1-10,**

28 Defendants.

8:17-cv-00746-JLS-JDE

**SUPPLEMENTAL SUR-  
REBUTTAL EXPERT REPORT  
AND DECLARATION OF  
MICHAEL VORENBERG**

Courtroom: 8A  
Judge: The Honorable Josephine  
L. Staton

Action Filed: April 24, 2017

<sup>1</sup> Rob Bonta has succeeded former Attorney General Xavier Becerra as the Attorney General of the State of California. Pursuant to Federal Rule of Civil Procedure 25(d), Attorney General Bonta, in his official capacity, is substituted as the defendant in this case.

**SUPPLEMENTAL SUR-REBUTTAL EXPERT REPORT AND  
DECLARATION OF MICHAEL VORENBERG**

I, Michael Vorenberg, declare under penalty of perjury that the following is true and correct:

1. I offer the following report as a sur-rebuttal report and declaration (“Sur-Rebuttal”) to the rebuttal report of Ashley Hlebinsky dated February 3, 2023 in this case. My background and qualifications already have been detailed in my supplemental expert report and declaration dated January 6, 2023, in this case.

2. This Sur-Rebuttal is based on my own personal knowledge and experience, and, if I am called as a witness, I could and would testify competently to the truth of the matters discussed in it.

**I. SUMMARY OF SUR-REBUTTAL**

3. In her rebuttal, Ashley Hlebinsky has offered no evidence to counter the arguments and conclusions that I made in my report. Her statement does include some assertions that run counter to my report, but as detailed below, these assertions are based on poor methodology or factual error. Indeed, the Hlebinsky rebuttal as a whole employs methods that do not comport with widely accepted professional standards or practices in the field of historical research.

**II. A NOTE ON TERMINOLOGY: “THE SECOND FOUNDING”**

4. Hlebinsky regularly uses the phrase “The Second Founding” to describe the period of U.S. history immediately following the Civil War. By contrast, my report usually refers to this period as “Reconstruction” or “post-Civil War Reconstruction.” (Vorenberg report, ¶ 11, pages 5-6.) Among historians such as myself who specialize in the Civil War and Reconstruction, the use of “The Second Founding” to describe the period in question is unusual but not unheard of. Indeed, Eric Foner, the leading historical expert on Reconstruction and the author of the seminal book on the period, has recently published a book titled *The Second Founding*, which examines the constitutional amendments adopted during

1 Reconstruction (the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> amendments).<sup>2</sup> For the purposes of my  
2 report and now again for my Sur-Rebuttal, I use Reconstruction in favor of “The  
3 Second Founding” because of the conventions of the discipline, but I accept “The  
4 Second Founding” as a legitimate descriptor of the period. For the purposes of this  
5 Sur-Rebuttal, then, “Reconstruction” and “The Second Founding” should be  
6 regarded as synonymous.

7 **III. THE HLEBINSKY REBUTTAL AND FIREARMS HISTORY EXPERTISE**

8 5. Hlebinsky identifies herself as a “firearms historian” (Hlebinsky  
9 rebuttal, ¶ 1, page 2, line 1.) Yet her rebuttal contains errors regarding firearms  
10 history that are recognizable to even a generalist historian of the United States. For  
11 example, she writes that “it is unfair to assume that a person until recently would  
12 make a clear distinction between capacities under and over ten rounds and is  
13 historically arbitrary, particularly for the time frames being discussed.” (Hlebinsky  
14 rebuttal, ¶ 18, page 12, lines 15-17.) “Ten rounds” may seem an abstract number,  
15 but in the context of Reconstruction, the difference was meaningful. In the abstract,  
16 a repeating rifle holding fourteen rounds should fire those rounds in twice the time  
17 that it takes a repeating rifle holding seven rounds to fire its load. But this abstract  
18 principle does not bear out when applied to Reconstruction-era firearms. A Spencer  
19 rifle held seven rounds.<sup>3</sup> To fire fourteen rounds, the user of the Spencer had to  
20 load the rifle with seven rounds, fire all the rounds, reload with another set of seven  
21 rounds, and fire the load again. Between each round fired, the user had to take  
22 three actions: cock the hammer at the top of the barrel backwards; move the lever at

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23 <sup>2</sup> Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877*  
24 (rev. ed., New York: HarperCollins, 2014); Eric Foner, *The Second Founding: How*  
25 *the Civil War and Reconstruction Remade the Constitution* (New York: W. W.  
Norton, 2019).

26 <sup>3</sup> Hlebinsky notes that, in a sentence about the number of rounds in Sharps  
27 and Spencer rifles, I misstated the number of rounds in each. (Hlebinsky rebuttal,  
28 page 5, note 2.) This information does not change my ultimate conclusion that  
Henrys and Winchesters were the only guns produced in significant numbers during  
the Reconstruction period that held ten or more rounds.

1 the bottom of the barrel forwards; and move the same lever backwards. By  
2 contrast, the user of a Henry rifle simply had to load fourteen rounds into the  
3 chamber below the barrel of the gun and fire off the whole load. Between each  
4 shot, the user only had two motions to perform: move the lever at the bottom of  
5 barrel forward, then move it backward. Thus, in the case of a Spencer vs. a Henry,  
6 the speed of firing a large number of rounds was not simply inversely proportional  
7 to the number of rounds fired. More to the point: the firearm in this era that held  
8 more than ten rounds (the Henry or Winchester) could shoot a disproportionately  
9 larger number of rounds per minute than the firearm that held fewer than ten rounds  
10 (the Spencer). With the Winchester '66, the speed of delivering high volumes of  
11 rounds became even greater, as reloading could be done by feeding rounds into the  
12 "gate" at the side of the breech rather than waiting for all rounds to be expelled  
13 before reloading, as was the case with the Henry and the Spencer.

14 6. Another statement regarding firearms in the Hlebinsky rebuttal that  
15 strikes even a generalist as odd is the following:

16 Rifling, the boring out of the inside of a barrel with spiral lands and  
17 grooves to spin a projectile, thus making it more accurate, was  
18 developed at the turn of the sixteenth century and appeared  
19 predominantly in civilian arms, with a few military exceptions from  
the American Revolution, until just before the turn of the twentieth  
century when military tactics finally caught up to the technology.

20 (Hlebinsky rebuttal, ¶ 12, page 8, lines 19-24.) The implication of this statement is  
21 that the U.S. military did not use rifled barrels in significant numbers until the late  
22 1800s. Yet rifled weapons such as the Springfield were by far the most common  
23 types of firearms used by U.S. and Confederate military personnel by the end of the  
24 Civil War (1865), roughly thirty years before the point when, according to  
25 Hlebinsky, the U.S. military adopted rifled technology in a widespread way.

26 7. I will note one final controversial statement about firearms history in  
27 the Hlebinsky rebuttal that is problematic even to the generalist historian:  
28

1 There has always been an ebb and flow of civilian and military  
2 firearms for centuries, some with clearer lines than others. However,  
3 the assertion that historically a gun could be completely understood as  
4 only for war in a time when there was such interchangeability, is  
5 presentist at best.

6 (Hlebinsky rebuttal, ¶ 16, page 12, lines 3-6.) It may indeed be historically  
7 inaccurate to suggest that a certain gun was used “only for war.” But it is equally  
8 inaccurate to suggest that all guns were fully interchangeable between military and  
9 civilian use. As my report noted, Winchesters were owned by civilians only in  
10 small numbers, while most of the owners were armies (non-U.S. armies in  
11 particular) and U.S. law enforcement organizations. (Vorenberg report, ¶ 7, page 4,  
12 lines 3-9.) There was no significant “blurring” of the line between government  
13 ownership and civilian ownership when it came to Winchesters. The same was true  
14 of Spencer repeating rifles, incidentally. During the Civil War, Spencers were sold  
15 to the U.S. army and, to a lesser extent, the Confederate army; they had no  
16 meaningful civilian market. When the Civil War ended, U.S. soldiers were allowed  
17 to buy their Spencers, and roughly 10,000 did so. But the company that made  
18 Spencers did not then market their weapons to civilians; it marketed them only to  
19 armies. Eventually, this company was acquired by the Winchester company, which  
20 sold all the surplus Spencers in its inventory to foreign armies rather than  
21 attempting to sell them to civilians.<sup>4</sup> It is not ahistorical or presentist to say that,  
22 circa 1868 (the date of the ratification of the Fourteenth Amendment), Henrys and  
23 Winchesters, as well as lower-capacity repeating rifles like Spencers, were  
24 primarily—and nearly exclusively—for non-civilian use.

#### 24 **IV. HLEBINSKY’S USE, NON-USE, AND MISUSE OF HISTORICAL SOURCES**

25 8. Historians are expected to be adept at finding and appropriately using  
26 materials from the past. This skill requires recognizing that some historical sources

27 <sup>4</sup> Joseph G. Bilby, *A Revolution in Arms: A History of the First Repeating*  
28 *Rifles* (Yardley, Penn.: Westholme, 2006), 195-204.

1 are more reliable than others. It also requires reading sources critically. Rather  
2 than accepting any source purporting to be “history” as accurate, historians are  
3 expected to interrogate sources for errors, biases, and decontextualization (that is,  
4 presenting a fact or series of facts outside of the relevant contexts that give the facts  
5 their correct historical meaning). Repeatedly in her rebuttal, Hlebinsky is  
6 inattentive to the basic standards of source use in historical research.

7 **A. Use of Unreliable Sources**

8 9. Hlebinsky writes that the Cody Firearms Museum (CFM), where she  
9 spent most of her professional career, is “the only accredited firearms museum in  
10 the United States.” (Hlebinsky rebuttal, ¶ 4, page 3, lines 9-10.) Her use of the  
11 word “accredited” indicates that she accepts the principle that there are standards in  
12 the practice of history, or at least in the way that history is displayed to the public.

13 10. Before moving onto the issue of whether Hlebinsky’s work meets the  
14 standards of historical practice, I note that the CFM is not technically the only  
15 accredited firearms museum in the United States. Although Hlebinsky does not  
16 identify the organization that “accredited” the CFM, almost certainly it is the  
17 American Alliance of Museums (AAM), as this is the only commonly known  
18 organization in the U.S. that accredits museums. The AAM has accredited the  
19 Buffalo Bill Center of the West, of which the CFM is a component institution. If  
20 by this definition the CFM is accredited, then other firearms museums that are  
21 components of larger, accredited institutions must be considered accredited. One  
22 such museum is the Smithsonian Institution’s National Firearms Collection, which  
23 is a component of the accredited National Museum of American History.  
24 Hlebinsky knows of the Smithsonian’s National Firearms Collection, as she worked  
25 there early in her career. (Hlebinsky rebuttal, ¶ 3, page 3, lines 7-8.) Yet she  
26 inexplicably excludes the Collection from the category of “accredited firearms  
27 museums,” even though it meets the same standard of accreditation as the CFM.  
28



1 11. The point about accreditation relates to the larger problem in  
2 Hlebinsky's rebuttal of imprecision in general and faulty source use in particular.  
3 The statement about accreditation made by Hlebinsky implies that she believes that  
4 evidence from non-accredited museums is of a lesser or negligible value than  
5 evidence from an accredited museum. That being the case, how can Hlebinsky  
6 account for her decision to use evidence from the NRA National Firearms Museum,  
7 a firearms museum that is not accredited by the AAM?

8 12. The NRA National Firearms Museum is the main source for  
9 Hlebinsky's claim that in Boston around the year 1756, "a Cookson-type twelve-  
10 shot repeater was made by gunmaker John Shaw." (Hlebinsky rebuttal, ¶ 20, page  
11 14, lines 6-7.) Hlebinsky's own standards, indicated by her emphasis on museum  
12 accreditation, should have led her to seek confirmation of information provided by  
13 this unaccredited source. The information about the "Cookson-type twelve-shot  
14 repeater" provided by the NRA National Firearms Museum is used by Hlebinsky to  
15 make the argument that repeating firearms were common at the time of the  
16 founding of the United States. Yet other, more reliable sources question the  
17 authenticity of the gun in question and the validity of using the gun to make the  
18 claim about the commonality of repeaters at the time of the founding.<sup>5</sup> To bolster  
19 her problematic claim about the "Cookson," Hlebinsky also cites, in the same  
20 footnote containing the NRA National Firearms Museum source, a blog containing  
21 a video from the NRA Firearms Museum that shows a person holding and  
22 describing the "Cookson." The narrator in the video makes statements that actually  
23 contradict Hlebinsky's contention about the commonality of repeaters at the time of  
24 the founding. He says of the period when the gun was made: "this was in the day  
25 when a single-shot muzzle-loader was basically all you had." He then says that a  
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27 <sup>5</sup> See, for example, David S. Weaver and Brian Goodwin, "John Cookson,  
28 gunmaker," *Arms and Armour*, 19 (June 2022), 43-63, esp. 51-61.



1 gun such as the one he displays, a breech-loading gun that could fire twelve shots  
2 before being re-loaded, was “an unusual gun.”<sup>6</sup>

3 13. Another example of Hlebinsky’s use of inferior sources is found in her  
4 discussion of the “Belton repeating fusil.” (Hlebinsky rebuttal, ¶ 20, page 14, lines  
5 7-16.) According to Hlebinsky, Joseph Belton, the supposed maker of the supposed  
6 gun, successfully persuaded Benjamin Franklin to lobby George Washington, then  
7 General of the Continental Army, to buy Belton’s guns. Washington agreed to  
8 order one hundred of them but then canceled the order because they were too  
9 expensive. The source that Hlebinsky gives for this information includes a website  
10 that tells the history roughly as Hlebinsky has told it.<sup>7</sup> However, this history is  
11 faulty. Franklin’s letter to Washington does not recommend a firearm designed by  
12 Belton but rather a riverine submarine designed by him. Another website cited by  
13 Hlebinsky—in the same footnote containing the erroneous website—contains a  
14 copy of the actual letter by Franklin to Washington indicating that Belton’s pet  
15 project is a submarine, not a gun.<sup>8</sup> Thus, in one footnote, Hlebinsky has cited a  
16 website containing a letter that she does not appear to have read (the one from  
17 Franklin to Washington), along with a website that she *has* read but has not  
18 verified. The gun in question, along with the identity of Joseph Belton, are  
19 questionable, complex matters, but instead of trying to understand and verify these  
20 matters through acceptable historical research, Hlebinsky has simply surfed the web  
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22 <sup>6</sup> <http://firearmshistory.blogspot.com/2014/02/the-cookson-repeater.html>  
23 (accessed Feb. 20, 2023). The video displayed at the blog may be found here:  
<https://youtu.be/cs4vjq6sW40> (accessed Feb. 20, 2023).

24 <sup>7</sup> [https://www.rockislandauction.com/riac-blog/assault-weapons-before-the-second-](https://www.rockislandauction.com/riac-blog/assault-weapons-before-the-second-amendment#:~:text=The%20Belton%20%22Roman%20candle%22%20fusil%20is%20the%20first,a%20chained%20charge%20much%20like%20a%20Roman%20candle)  
25 [amendment#:~:text=The%20Belton%20%22Roman%20candle%22%20fusil%20is%20the%20first,a%20chained%20charge%20much%20like%20a%20Roman%20candle](https://www.rockislandauction.com/riac-blog/assault-weapons-before-the-second-amendment#:~:text=The%20Belton%20%22Roman%20candle%22%20fusil%20is%20the%20first,a%20chained%20charge%20much%20like%20a%20Roman%20candle)  
26 (accessed Feb. 20, 2023).

27 <sup>8</sup> <https://founders.archives.gov/documents/Washington/03-05-02-0311>  
28 (accessed Feb. 20, 2023).

1 for information, and has not even done that well. Exemplary, extensive historical  
2 research into Belton and the “Belton repeating fusil” has been conducted by Robert  
3 Held, whose conclusions are at odds with Hlebinsky’s, but Hlebinsky has not  
4 bothered to consult this work—or at least gives no evidence of having done so. If  
5 she had consulted it, she would have learned that almost certainly, Belton had never  
6 produced a single repeating rifle of the sort that he vainly hoped would be  
7 purchased by the Continental Congress.<sup>9</sup>

8 **B. Non-Use of Sources**

9 14. The non-use of Robert Held’s work on Belton firearms is only one  
10 example of Hlebinsky’s failure to use obvious historical sources for information.  
11 Her most glaring non-use of sources is evident in her discussion of the production  
12 and distribution of Henry and Winchester rifles in the Reconstruction era. The  
13 most valuable sources regarding production and distribution of these firearms are  
14 the serial number ledger books of the Winchester Repeating Arms Company. The  
15 Cody Firearms Museum (CFM) possesses only those ledger books for the post-  
16 1875 period—that is, the period that begins *after* the crucial era termed the “Second  
17 Founding Era” by Hlebinsky.

18 15. Fortunately, prior to the Company records being transferred to the  
19 CFM, they were carefully examined by John E. Parsons, sometime in the early  
20 1950s. Parsons, with the help of the curator of the company’s records of the time,  
21 had access to information from the serial number ledger books in the pre-1875  
22 period. This information covered the Henry Rifle and the various models of the  
23 Winchester.<sup>10</sup> For my report, the Parsons research was the primary basis of my  
24 claims involving production and distribution numbers. (Vorenberg report, page 16,  
25 note 17; *ibid.*, page 29, note 29.) Since writing that report, I have conducted further

26 <sup>9</sup> Robert Held, *The Belton Systems, 1758 and 1784-86: America’s First*  
27 *Repeating Firearms* (Lincoln, R.I.: Andrew Mowbray, 1986), 36-39.

28 <sup>10</sup> John E. Parsons, *The First Winchester: The Story of the 1866 Repeating*  
*Rifle* (New York: Morrow, 1955), 102-7.

1 research into production and distribution numbers, using in particular studies  
2 produced by Herbert G. Houze. Among Houze's publications is a book published  
3 in 1994 which was commissioned by the Olin Corporation, then the owner of the  
4 Winchester company; this book largely confirms the numbers published by Parsons  
5 forty years earlier.<sup>11</sup> None of the works by Parsons or Houze was used by  
6 Hlebinsky in her rebuttal. It is evident that she has not consulted the works; she  
7 may not even be aware of them. Had she consulted them, she would have been able  
8 to provide relevant information for the pre-1875 period, and she would not have  
9 made the specious claim that "primary source evidence of foreign contracts are not  
10 well documented and in some cases, questionable." (Hlebinsky rebuttal, ¶ 25, page  
11 19, lines 10-11.) In fact, both Parsons and Houze provide reproductions of  
12 selections of primary-source foreign contracts. Parsons even provides an Appendix  
13 containing transcriptions of contracts made by the Winchester company with the  
14 Ottoman Empire in 1870; these were the most lucrative company contracts of the  
15 Reconstruction era.<sup>12</sup>

16 16. Serial number information in the Hlebinsky rebuttal is drawn from two  
17 scanty websites and from the serial number ledger records at the CFM, which, as  
18 noted above, cover only the period after 1875. (Hlebinsky rebuttal, page 19, note  
19 36.) Hlebinsky objects that my analysis of the numbers of Winchesters produced  
20 and distributed "have not originated in a study of the records" at the CFM.  
21 (Hlebinsky rebuttal, page 19, note 39.) It is true that I have not examined first-hand  
22 the serial number ledger records located at the CFM, but it is also true, as I have  
23 explained, that these original records are not useful for the pre-1875 period, and that  
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25 <sup>11</sup> Herbert G. Houze, *Winchester Repeating Arms Company: Its History and*  
26 *Development from 1865 to 1981* (Iola, Wisc.: Krause, 1994). See also, H. G.  
27 Houze, "A Reevaluation of the Henry and Model 1866 Serial Numbering," *Man at*  
28 *Arms*, 13 (July/August 1991), 10-17.

<sup>12</sup> Parsons, *The First Winchester*, 155-69.

1 the work by John E. Parsons that I relied on was in many ways a better source of  
2 information than the records as they exist now in the CFM.

3 17. For all that Hlebinsky emphasizes the importance of the serial number  
4 ledger records at the CFM, it is not clear that she has studied them closely. She  
5 writes that the Winchester records provide “pertinent information” about “when and  
6 where” specific models “left the factory.” (Hlebinsky rebuttal, page 19, note 39.)  
7 This statement implies that the records at the CFM tell us the destination of  
8 shipments of Winchesters. In fact, as is explained in the scholarship of John E.  
9 Parsons, the Winchester company serial number ledger records, with only a few  
10 exceptions, do not divulge the destinations of shipments. Each entry contains the  
11 number of guns shipped, the date shipped, and an order number. No information is  
12 regularly given in the ledgers as to the destination of the shipments. The original  
13 order books may have contained this information, but the order books have not  
14 been preserved.<sup>13</sup>

15 18. Hlebinsky rightly notes that not all Winchesters produced during the  
16 Reconstruction were shipped to foreign governments, but she woefully  
17 underestimates the fraction of sales to foreign governments, saying that these sales  
18 were only 1/3 of total sales. (Hlebinsky rebuttal, ¶ 25, page 19, line 6.) That  
19 fraction is based on production numbers covering the period 1875-1900, but the  
20 relevant period here—what Hlebinsky calls “The Second Founding”—is 1865-  
21 1875. As my report indicated, in the 1865-1875 period, most of the Winchesters  
22 sold went to foreign armies. (Vorenberg report, ¶ 26-28, pages 14-16.)

23 19. For Winchesters that were produced but not sold to foreign armies, we  
24 cannot assume that they were sold domestically. Yet Hlebinsky’s rebuttal suggests  
25 that many if not most of these guns were sold domestically and ended up in the  
26 hands of American civilians. She implies that the number of civilian-held  
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28 <sup>13</sup> Parsons, *The First Winchester*, 104-5.

1 Winchesters in the post-Civil War South was higher than I suggest, arguing that I  
2 am being “misleading” in inferring that the Winchesters used by the Louisiana and  
3 South Carolina militias represented most of the Winchesters in the South during  
4 Reconstruction. (Hlebinsky rebuttal, page 19, note 39.) Later in the rebuttal—and  
5 here she distorts the total number of Winchesters in the Reconstruction-era U.S. by  
6 including those produced in the 1890s—she writes, “With millions [of  
7 Winchesters] produced during this time frame, it begs the question of where those  
8 guns went since it wasn’t military service.” (Hlebinsky rebuttal, ¶ 27, page 21,  
9 lines 14-15.) It is incorrect to assume that all Winchesters produced were  
10 necessarily sold or distributed. For example, it is clear that the Winchester  
11 company kept hundreds of firearms warehoused at any given moment. That  
12 strategy made good business sense, as a foreign order might have to be fulfilled  
13 quickly. Evidence for warehousing of Winchesters comes from Houze’s research.  
14 In 1867, for example, the company reported an inventory valuing \$72,447.74. That  
15 inventory would have included not only Winchester rifles and carbines but other  
16 types of firearms as well as ammunition and accessories. A conservative estimate  
17 of the value of the inventory represented by Winchesters might be \$50,000 (roughly  
18 two-thirds of the inventory). Winchesters were priced between \$40 and \$50 at the  
19 time, so the total number of Winchesters warehoused might have been about just  
20 over 1,000.<sup>14</sup> Of course, the number of warehoused Winchesters could have been  
21 much greater than that. Again, I mention the warehousing issue only to emphasize  
22 the point that we cannot assume that Winchesters not sold to foreign armies were  
23 necessarily sold domestically and ended up in civilian hands.

24 20. The best research available on sales of Winchesters indicates that sales  
25 to American civilians were negligible prior to 1868, the year of the adoption of the

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27 <sup>14</sup> See Houze, *Winchester Repeating Arms Company*, 63-64, for the 1867  
28 financial statement and an 1867 broadside providing prices of goods.

1 Fourteenth Amendment. According to Houze, concerted efforts to market  
2 Winchesters to American civilians began only in January 1869.<sup>15</sup>

3 21. Obviously, the information provided by Parsons in the 1950s and  
4 Houze in the 1990s is essential to any historical analysis that examines numbers of  
5 Henrys and Winchesters produced and distributed, yet Hlebinsky has not used these  
6 works.

7 **C. Misuse of Sources**

8 22. With the sources that she *has* consulted, Hlebinsky often misrepresents  
9 or distorts their content. There are many examples of misuse of sources in the  
10 Hlebinsky rebuttal, but I will note only a few.

11 23. In writing of “repeaters” at the time of “the ratification of the Second  
12 Amendment,” Hlebinsky mentions a “fourteen-barrel double Nock volley gun-style  
13 rifle.” (Hlebinsky rebuttal, ¶ 21, page 15, lines, 9-10.) The source provided for this  
14 weapon is a YouTube video created by Ian McCollum, who Hlebinsky identifies as  
15 “one of the foremost authorities on firearms technology in the United States.”  
16 (Hlebinsky rebuttal, page 15, note 25.) Yet the video cited displays a gun that was  
17 not made at the time of the ratification of the Second Amendment but rather in the  
18 early 1800s. Also, the gun was made in London, another reason why Americans at  
19 the time of the ratification of the Second Amendment would not have known about  
20 it. (Hlebinsky rebuttal, page 16, note 27.)

21 24. In another part of the rebuttal, Hlebinsky distorts the content of an  
22 entry in *Flayderman’s Guide to Antique American Firearms*, an important source  
23 for firearms collectors. She uses the guide to claim that the Evans Repeating Rifle  
24 was a competitive model to the Winchester in the period between 1873 and 1879.  
25 12,200 models of the rifle were made in this period, Hlebinsky reports. (Hlebinsky

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27 <sup>15</sup> Houze, *Winchester Repeating Arms Company*, 360. Houze reports that the  
28 marketing efforts in 1869 and 1870 were successful—demand exceeded supply—  
but after 1870 domestic sales flattened.



1 rebuttal, ¶ 30, page 23, 20-24.) This information is technically accurate. However,  
2 almost all of the Evans rifles in question (10,000 of the 12,200, according to  
3 *Flayderman's Guide*) were produced in the period 1877-79—that is, in the period  
4 after “The Second Founding,” the era that Hlebinsky’s rebuttal statement ostensibly  
5 covers.<sup>16</sup>

6 25. Later in the rebuttal statement, Hlebinsky claims that “government  
7 disarmament” was the cause of the infamous massacre of Lakota at Wounded Knee  
8 in 1890; the source she cites for this claim is a reputable historical monograph,  
9 Robert M. Utley’s *The Last Days of the Sioux Nation*. (Hlebinsky rebuttal, ¶ 50,  
10 page 35, line 7.) Yet Utley’s account of the massacre makes it clear that  
11 “government disarmament” of the Lakota was not the intention of the U.S.  
12 government. Rather, the government sought to stop the “Ghost Dance,” mistakenly  
13 believing that the ceremony was prefatory to an insurgency. On December 29,  
14 1890, the day of the massacre, the Lakota were not concerned about disarmament;  
15 they mistakenly believed that Colonel James Forsyth’s troops meant to murder  
16 them all. Forsyth’s commander, Brigadier General John R. Brooke, was alone  
17 responsible for the order to disarm a band of Lakota that day. The order was not  
18 part of a general policy of “government disarmament.” When Forsyth carried out  
19 his commander’s order, his actions led to the inadvertent firing of a gun that was  
20 being seized, which in turn set off the massacre.<sup>17</sup> In calling the episode an  
21 example of “government disarmament,” Hlebinsky has misused Utley’s book.

## 22 **V. HLEBINSKY’S FALSE HISTORICAL NARRATIVES**

23 26. A historian can be forgiven for the occasional factual error or minor  
24 misrepresentation of a source, but it is unacceptable for historians to create false  
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26 <sup>16</sup> Norm Flayderman, *Flayderman’s Guide to Antique American Firearms*,  
27 (9<sup>th</sup> ed., Appleton, Wisc.: Gun Digest Books, 2019), 694-95.

28 <sup>17</sup> Robert M. Utley, *The Last Days of the Sioux Nation* (2<sup>nd</sup> ed., New Haven,  
Conn.: Yale University Press, 2004), 146-47, 204-13.



1 narratives that purport to be authentic histories. Hlebinsky's rebuttal is filled with  
2 such false historical narratives.

3 27. One false narrative given by Hlebinsky, which is the narrative  
4 countered most directly and repeatedly in my initial report and this Sur-Rebuttal, is  
5 that repeating firearms were generally common and also commonly held by  
6 civilians during the Reconstruction era. Yet Winchester repeating rifles, the only  
7 type of high-capacity firearms produced in the era, did not begin to proliferate in  
8 large numbers until the 1890s. Hlebinsky uses the "hundreds of thousands" of  
9 Winchesters produced in the last decade of the nineteenth century to create a false  
10 narrative that a similar proliferation took place twenty to thirty years earlier.  
11 (Hlebinsky rebuttal, page 19, note 39.)

12 28. Another such false narrative is that repeating firearms were common at  
13 the time of creation of the Second Amendment (1791). (Hlebinsky rebuttal, ¶ 19-  
14 22, pages 12-17.) In my report, I challenged certain elements of this narrative.  
15 (Vorenberg report, ¶ 16-18, pages 8-9.) I challenge other elements above, in my  
16 discussions of Hlebinsky's use of evidence relating to the Cookson/Hill and Belton  
17 "repeaters." In a declaration and deposition for a separate, related federal case,  
18 Hlebinsky herself has contradicted the narrative of Second Amendment-era  
19 "repeaters" that she provides in her rebuttal in the current case.<sup>18</sup>

20 29. Other instances of false narratives abound in the Hlebinsky rebuttal,  
21 but for the sake of brevity I will mention only two more.

22 30. Hlebinsky offers a version of events concerning the Kansas Territory  
23 in 1856 that is unrecognizable as legitimate history. In her version, pro-slavery  
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25 <sup>18</sup> Declaration of Ashley Hlebinsky, *Oregon Firearms Federation v. Brown*,  
26 Case No. 2:22-cv-01815-IM (D. Or. Jan. 6, 2023) (ECF No. 72), para. 22:  
27 Hlebinsky stating that the examples of "repeaters" that she gives were "one-off  
28 examples"; that they were "unsuccessful by modern and/or historic standards";  
that perhaps fewer than ten such "repeaters" existed at the time of the founding of  
the United States.

1 settlers sacked the city of Lawrence, Kansas in order to disarm “Free Soilers” who  
2 were armed with Sharps rifles. In response, Senator Charles Sumner of  
3 Massachusetts defended gun rights in a speech attacking South Carolina Senator A.  
4 P. Butler, who had advocated disarmament for antislavery settlers in Kansas.  
5 Butler’s response, it appears in Hlebinsky’s account, was to beat Sumner with a  
6 cane on the floor of the Senate. Hlebinsky does not say that Butler himself caned  
7 Sumner, but that is the implication of her statement that Sumner’s speech  
8 “culminated in violence against Sumner, who was beaten with a cane on the Senate  
9 floor for advocating against disarmament.” (Hlebinsky rebuttal, ¶ 49, page 35, lines  
10 5-6.)

11 31. This history told by Hlebinsky is deeply flawed. The leader of the  
12 forces that attacked Lawrence on May 21, 1856 did indeed demand that all  
13 residents of the town give up their arms. But attempted disarmament was only one  
14 part of their action that day. Even after they were given a cannon by a leader of the  
15 Free Soilers—a gesture of disarmament—the attackers burned down the main hotel  
16 of the town as well as other buildings, and they destroyed the printing presses used  
17 by antislavery pamphleteers and newspapermen. All of these actions, one should  
18 note, occurred after, not before, Sumner’s famous speech of May 19-20, 1856.  
19 Thus, in contrast to Hlebinsky’s account, the decision by Sumner to deliver the  
20 speech, as well as the content of that speech, could not have had anything to do  
21 with the sack of Lawrence that followed.

22 32. Also, quite contrary to the implication of Hlebinsky’s account, Sumner  
23 was not a supporter of gun rights. Like most abolitionists, he advocated non-  
24 violent methods. He gave the speech in question only after being convinced by  
25 agents of the New England Emigrant Aid company that it had not provided guns to  
26 antislavery settlers in Kansas (this was a lie, but Sumner believed it). In his speech,  
27 Sumner did not defend gun rights in general but only the possession of a “rifle” by  
28 “the pioneer.” That is, Sumner thought it was reasonable that Americans entering

1 lawless places might carry guns for self-defense.<sup>19</sup> The passage quoted by  
2 Hlebinsky occupies only about 1% of the total text of this very long speech, the  
3 purpose of which was to denounce supporters of slavery in general and to prohibit  
4 slavery from the territory of Kansas in particular. Sumner's speech called for a  
5 peaceful prohibition of slavery in Kansas by legislation. He contrasted this  
6 peaceful approach to the violent methods of pro-slavery militants in or near Kansas,  
7 who the year before had tried and failed to seize Lawrence with an illegitimate,  
8 "shot-gun militia."<sup>20</sup> It is true that Senator Butler had denounced the smuggling of  
9 Sharps rifles to antislavery settlers in Kansas and had suggested that the owners of  
10 the guns might be arrested (he further quipped that Sumner should be drafted to  
11 head the *posse comitatus* that would make the arrests).<sup>21</sup> This statement was indeed  
12 seized upon by Sumner, as Hlebinsky writes. Sumner used the statement as  
13 evidence of the derision of the Constitution by Butler and all other proslavery  
14 advocates. Sumner's only real purpose, in other words, was to denounce slavery's  
15 defenders, not to champion the Second Amendment. Hlebinsky has taken  
16 Sumner's statement out of its historical context, something a historian should  
17 always avoid.

18 33. In suggesting that it was Sumner's comments on the Second  
19 Amendment that provoked the attack on him, Hlebinsky has further distorted the  
20 historical record. Sumner was attacked for two major reasons: his longstanding  
21 position against slavery; and his use of personal insults against Butler during his  
22 speech of May 19-20, 1856 (the insults occur in a different part of the speech than  
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24 <sup>19</sup> Sumner's attitude regarding gun rights for "the pioneer" corresponds to  
25 what I wrote in my report about American attitudes toward gun possession in areas  
26 considered lawless, such as the mid-19<sup>th</sup> century West. See Vorenberg report, ¶ 53,  
27 page 30, lines 14-18.

28 <sup>20</sup> Charles Sumner, *The Kansas Question* (Cincinnati: George S. Blanchard,  
1856), 10-11.

<sup>21</sup> Sumner, *The Kansas Question*, 22.

1 the part quoted by Hlebinsky). The actual caning of Sumner was done not by  
2 Butler, who was in South Carolina at the time, but by Butler's cousin, Preston  
3 Brooks, a U.S. Representative.<sup>22</sup>

4 34. Another egregious example of a false narrative in Hlebinsky's rebuttal  
5 appears in her characterization of Ida B. Wells and Wells's allies in the anti-  
6 lynching cause as gun-rights advocates. In this narrative, Hlebinsky makes out  
7 Wells and another anti-lynching activist, James R. Mitchell, Jr., to be, first and  
8 foremost, defenders of gun-owning rights for Black Americans. (Hlebinsky  
9 rebuttal, ¶ 50, pages 35-36.) As part of this narrative, Hlebinsky provides a  
10 quotation from one of Wells's most famous publications, *Southern Horrors* (1892):  
11 "a Winchester rifle should have a place of honor in every black home, and it should  
12 be used for the protection which the law refuses to give." It is worth noting that the  
13 quotation in question, as well as the anti-lynching movement in general, took place  
14 more than twenty years after the ratification of the Fourteenth Amendment and ten  
15 years after the end of Reconstruction. As has been stated earlier in this Sur-  
16 Rebuttal, and also has been documented by Hlebinsky herself, by the 1890s, when  
17 Wells wrote *Southern Horrors*, Winchesters had begun to proliferate in numbers far  
18 greater than they had existed during Reconstruction. The time period invoked by  
19 Hlebinsky (the 1890s) thus makes the events described irrelevant to the question of  
20 the state of high-capacity guns and gun laws circa 1868.

21 35. Hlebinsky's use of the Wells statement also represents a distortion of  
22 history. The top priority for Wells and her allies was the passage of state and  
23 federal anti-lynching laws. Such laws, not gun ownership or anti-gun restrictions,  
24 were their avowed cause.<sup>23</sup> That is why the quotation given by Hlebinsky ends

25 <sup>22</sup> Manisha Sinha, *The Slave's Cause: A History of Abolition* (New Haven,  
26 Conn.: Yale University Press, 2016), 546-48; David Herbert Donald, *Charles*  
27 *Sumner and the Coming of the Civil War* (New York: Alfred A. Knopf, 1960), 278-  
28 95.

<sup>23</sup> Nell Irvin Painter, *Standing at Armageddon: The United States, 1877-1919*

1 with the phrase: “. . . which the law refuses to give.” Blacks in the United States in  
2 the 1890s had the same gun-owning rights as Whites, and, as Hlebinsky notes,  
3 Blacks were able to use those rights to purchase guns, including Winchesters. Yet  
4 these facts had no bearing on the fight by Wells and her allies for anti-lynching  
5 laws, a fight that continued well beyond the 1890s. (Not until 2022 was a federal  
6 anti-lynching law adopted: the Emmett Till Anti-Lynching Act.) It was only  
7 because legislators by the 1890s had failed to adopt anti-lynching legislation, and  
8 because the lynching of Black Americans occurred at unprecedented rates in the  
9 late 1800s, that Wells and some of her allies suggested that Blacks might purchase  
10 guns for self-defense. Had these Black American leaders witnessed the passage of  
11 the legislation they sought, and had that legislation been enforced, then their  
12 statements about guns for self-defense would have been unnecessary, and almost  
13 certainly they would not have made them. For Hlebinsky to turn this episode, a  
14 story of heroic though failed activism on behalf of legislation to combat white  
15 terror, into a history of gun-rights activism, is a crass distortion of the historical  
16 record.

17 36. Had Hlebinsky used standard sources for historical research, such as  
18 articles and monographs written by historians, or even college-level American  
19 history textbooks, she might have avoided producing these faulty narratives.  
20 Instead, her major source for American history, at least for the episodes involving  
21 Charles Sumner and Ida B. Wells, is a firearms law textbook written not by  
22 historians but by attorneys. To the extent that these authors are interested in  
23 history, it is only to cherry-pick incidents and words from history that support their  
24 position in favor of broad gun rights.<sup>24</sup> That Hlebinsky used this volume as her  
25 (New York: W. W. Norton, 1987), 223-24.

26 <sup>24</sup> Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory  
27 Wallace, and Donald Kilmer, *Firearms Law and the Second Amendment:  
28 Regulation, Rights, and Policy* (3<sup>rd</sup> ed., New York: Wolters Kluwer, 2022).  
Hlebinsky cites this volume more than she cites any other source: see Hlebinsky

1 main source, rather than using a balanced, more objective history, represents a  
2 disregard for the practice of history as well as indifference toward historical  
3 accuracy.

4 **VI. CONCLUSION**

5 37. In a concurring opinion in the 2010 U.S. Supreme Court case  
6 *McDonald v. Chicago*, Justice Antonin Scalia wrote that historical analysis can  
7 require “making nuanced judgments about which evidence to consult and how to  
8 interpret it.” (561 U.S. 742, 803-804 (2010).) In the 2022 U.S. Supreme Court  
9 case *New York State Rifle and Pistol Association Inc. v. Bruen*, the majority opinion  
10 authored by Justice Clarence Thomas quoted Scalia’s words approvingly. (142 S.  
11 Ct. 2111, 2130 (2022).) The standards of historical analysis that the authors of  
12 these opinions called for have not been met in the rebuttal offered by Ashley  
13 Hlebinsky. The result is a deeply flawed piece of writing by Hlebinsky that should  
14 not be accepted as legitimate historical analysis and that fails to controvert or  
15 disprove my opinions about the existence, usage, and regulation of high-capacity  
16 firearms during Reconstruction.

17  
18 I declare under penalty of perjury that the foregoing is true and correct.

19 Executed on February 24, 2023 at Providence, Rhode Island.

20  
21   
22 Michael Vorenberg

23  
24 \_\_\_\_\_  
25 purports to consider “arms laws in their broader social context” and to present  
26 material “in conjunction with the culture, technology, and politics of their times”  
27 (xxxi), but the selective use of historical evidence in favor of broad gun rights is  
28 evident throughout the volume. The final paragraph of the hard-copy edition of the  
volume here cited contains the following statements: “governments . . . present  
perhaps the greatest threat to liberty”; and “in the most dire circumstances, the  
armed populace is the last line of defense for legitimate government that respects  
human rights” (1292).